Moreover, in attempting to diminish the circuit split by relying on cases outside the employment termination context, respondents fail to acknowledge numerous recent cases declining to hold that an official's conduct was "random and unauthorized" simply because it was in violation of state law.[3] Thus, recharacterizing the question presented in broader terms simply illustrates the breadth of the conflict and confusion regarding the scope of the *Parratt-Hudson* doctrine. Petitioner acknowledges that this conflict and confusion may even extend to decisions in different settings within the same circuit. But that inter- and intra-circuit conflict is a reason to grant certiorari in this case, not a reason to assume that there is no real conflict at all.

Indeed, the judges of the courts of appeals have not shared respondents' view that the state of the law is clear and consistent. See, *e.g.*, *Locurto* v. *Safir*, 264 F.3d 154, 173 (CA2 2001) (stating that *Zinermon* "has generated considerable confusion among the courts of appeals," creating a "legal thicket"); *Charbonnet* v. *Lee*, 951 F.2d 638, 642 n.17 (CA5 1992) (remarking on the "legal and institutional instability" of *Zinermon*); *Caine* v. *Hardy*, 943 F.2d 1406, 1415 (CA5 1991) ("[T]he courts of appeals have not found *Zinermon* easy to interpret."); see also *O'Neill* v. *Baker*, 210 F.3d 41, 51 (CA1 2000) (Selya, J., concurring in judgment) (calling the *Parratt-Hudson* a "doctrinal swamp"); *Easter House*, 910 F.2d at 1409 (Easterbrook, J., concurring)

---

[3] See, *e.g.*, *Woodard* v. *Andrus*, 419 F.3d 348 (CA5 2005) (County Clerk's policy of charging filing fees above state law limits not "random and unauthorized"); *Castellano* v. *Fragozo*, 352 F.3d 939, 956 (CA5 2003) (en banc) (*Parratt-Hudson* inapplicable to claim of denial of due process arising from unlawful use of manufactured evidence and perjured testimony); *Thomas* v. *Cohen*, 304 F.3d 563, 578-80 (CA6 2002) (doctrine inapplicable to unlawful eviction without prior hearing); *Brooks* v. *George County*, 84 F.3d 157, 165 (CA5 1996) (Sheriff's custom of failing to pay inmate wages due under state law not "random and unauthorized").

(describing the doctrine's development as "resembling the path of a drunken sailor").

4. Finally, as described in the petition (at 15-28), the First Circuit's decision effects a breathtaking, and erroneous, expansion of the *Parratt-Hudson* doctrine. The First Circuit rule prevents victims of even the most serious violations of the most basic due process rights from seeking a federal remedy whenever state law also prohibits the conduct and provides a post-deprivation remedy.

This result is contrary to the basic purposes of the Due Process Clause and 42 U.S.C. 1983, both of which were enacted in large part as a response to the "random and unauthorized" actions of state officials who arbitrarily deprived newly freed slaves of their lives and property in the face of state laws that promised equal treatment and fair procedures. See, *e.g.*, *United States* v. *Price*, 383 U.S. 787, 801 (1966); *Monroe* v. *Pape*, 365 U.S. 167, 174-76 (1961). The First Circuit's reading of *Parratt-Hudson* completely undermines those purposes, withdrawing a federal forum from victims of even the most egregious violations of the Constitution's most fundamental due process rights whenever the State happens to have incorporated those rights into state law as well. By the same token, the First Circuit permits a federal suit for less significant due process claims whenever a State has failed to incorporate federal due process standards into state law. Neither this Court, nor the framers of the Due Process Clause and Section 1983, could have intended to allocate access to federal remedies in such an arbitrary and haphazard manner.

CONCLUSION

For the foregoing reasons, and those set forth in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

Pamela S. Karlan
STANFORD SUPREME COURT
LITIGATION CLINIC
559 Nathan Abbott Way
Stanford, CA 94305

Ross D. Ginsberg
DONOVAN HATEM, L.L.P.
World Trade Center East
Two Seaport Lane
Boston, Massachusetts 02210

Thomas C. Goldstein
(Counsel of Record)
Amy Howe
Kevin K. Russell
GOLDSTEIN & HOWE, P.C.
4607 Asbury Pl., NW
Washington, DC 20016
(202) 237-7543

September 28, 2005